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No. 96-180

In the Supreme Court of the United States

OCTOBER TERM, 1996

MORRIS HERRING, ET AL., PETITIONERS

v.

FEDERAL DEPOSIT INSURANCE CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL DEPOSIT INSURANCE CORPORATION IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly declined to reach the merits of petitioners' claims based on the determination that petitioners had no financial interest in the outcome of the litigation and therefore lacked standing to sue.

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OPINIONS BELOW

The amended opinion of the court of appeals (Pet. App. 1a-10a) is reported at 82 F.3d 282. The original, superseded opinion of the court of appeals (Pet. App. 11a-20a) is reported at 72 F.3d 762. The opinions of the district court (Pet. App. 21a-47a) are unreported.

JURISDICTION

The original judgment of the court of appeals was entered on December 26, 1995. A petition for rehearing was denied on April 19, 1996, and an amended opinion, superseding the original opinion, was entered

on the same date. The petition for a writ of certiorari was filed on July 18, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In September 1981, the Arizona Superintendent of Banks placed Southwestern Bank (Bank) into receivership, and the FDIC was appointed as receiver. In that capacity, the FDIC liquidated the receivership estate and paid all depositors, all preferred and secured claimants, and all liquidation expenses. In May 1990, the FDIC filed a motion with the Arizona Superior Court (the state trial court) seeking permission to disburse the remaining funds in the receivership account and to terminate the receivership. Petitioners, shareholders of the failed Bank, raised various objections, complaining of faulty accounting and of insufficient information with respect to an alleged $530,124 loss. Pet. App. 4a-5a, 22a-23a.

The state trial court overruled those objections. It held that the FDIC's actions were reasonable and within the scope of its receivership authority, that the receivership accounting was correct, and that the disbursement of funds as requested was appropriate. See Appellee's Supp. C.A. E.R. 41-42. The court also ruled that even if the disputed $530,124 were disallowed, the funds remaining would be insufficient to pay the FDIC's interest claims and that, consequently, there would be no remaining funds from which to pay any shareholders, including petitioners. *Id.* at 42; Pet. App. 5a. Petitioners did not appeal that latter ruling.

On August 14, 1991, the state trial court terminated the receivership, and petitioners appealed the judgment to the Arizona Court of Appeals. Pet. App. 5a.

That court granted the FDIC's motion to strike portions of petitioners' reply brief which alleged, for the first time, that FDIC and its counsel had engaged in conspiracy, fraud, theft, misrepresentation and the commission and subornation of perjury. *Id.* at 25a. It then affirmed the judgment of the state trial court, and the Arizona Supreme Court denied review. *Id.* at 25a-26a.

2. In February 1993, petitioners brought this action in the state trial court to set aside the existing state-court judgment on the ground that the FDIC had perpetrated a "fraud on the court." Pet. App. 6a; cf. Fed. R. Civ. P. 60(b). The FDIC removed the action to federal district court.

The district court granted summary judgment for the FDIC. It held that the FDIC had not committed a fraud on the court, and indeed that petitioners had presented no evidence that it had done so. Pet. App. 31a-33a, 36a-37a. The district court also found that petitioners were barred from bringing this action by res judicata and collateral estoppel. It noted that petitioners had failed to pursue their fraud claims in the state trial court and that "there is nothing in the record to indicate that [they] were deprived of the opportunity, through fraud or otherwise, from completely developing and litigating their case." *Id.* at 37a.

The court of appeals affirmed on a separate ground. It held that petitioners lacked a financial interest in the outcome of this litigation and that they therefore lacked standing to sue. The court explained that "the FDIC and other creditors have interest claims of approximately $1,500,000. Thus, even if the $530,124 were disallowed, the resulting $603,000 deficiency would still leave [petitioners] nothing." Pet. App. 7a.

The court also declined petitioners' invitation to investigate their "fraud on the court" allegations *sua sponte*. Because petitioners had no financial interest in the litigation, the court held that no justiciable case or controversy existed and that setting aside the judgment would be a "fruitless gesture." *Id.* at 10a.

ARGUMENT

1. The court of appeals based its holding that petitioners lack standing to sue on the factual determination that, even if petitioners were to prevail on their claims, they would be unable to collect any funds from the receivership estate. In making that determination, the court correctly relied on petitioners' own calculations and on the relevant findings of the state trial court, which petitioners did not appeal and which they may not now contest. See Pet. App. 7a-8a. Petitioners' factbound challenge (see Pet. 23-28) to the court of appeals' determination on this point does not warrant further review.

Petitioners contend (see Pet. 25-26) that the "fraud" about which they complain taints the entire state-court judgment and therefore the factual determination underlying the court of appeals' standing determination. That argument is without merit. The district court correctly found that petitioners' fraud claims are without substance and that, in any event, petitioners are barred from raising those claims in federal court after having a full and fair opportunity to litigate them in the prior state-court proceedings. See Pet. App. 31a-33a, 36a-37a; see also *id.* at 8a ("the Arizona courts have established that, even if the FDIC engaged in fraud, *no* correction could generate any funds for the shareholders") (emphasis added).

2. Because petitioners have no financial or other legally cognizable interest in the outcome of this case, the court of appeals correctly held that this case is not justiciable under Article III. See generally *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992). As the court of appeals observed, "an asserted right to have the Government act in accordance with law is not sufficient, standing alone, to confer jurisdiction on a federal court." Pet. App. 9a (quoting *Whitmore* v. *Arkansas*, 495 U.S. 149, 160 (1990)); see also *Lujan*, 504 U.S. at 573-574.

Petitioners contend that, even if they lack standing to sue, the Ninth Circuit should have investigated their fraud claims *sua sponte* to protect "the integrity of the judicial process." Pet. 17-19. As the court of appeals observed, however, that course would be appropriate only where a party or nonparty, represented before the court, has a concrete interest in the outcome of the litigation. Pet. App. 9a-10a (citing *Universal Oil Prods. Co.* v. *Root Refining Co.*, 328 U.S. 575, 578 (1946)). Here, by contrast, because "no one has a recognizable interest in the fraud claim," Pet. App. 9a, this federal proceeding does not now, and did not at its inception, constitute "a justiciable case or controversy." *Id.* at 10a (quoting *Root Refining Co.* v. *Universal Oil Prods. Co.*, 169 F.2d 514, 521-522 (3d Cir. 1948), cert. denied, 335 U.S. 912 (1949)). In any event, as the district court determined, petitioners' underlying (and nonjusticiable) concerns about "the integrity of the judicial process" are without substance and are barred by res judicata and collateral estoppel. See Pet. App. 31a-33a, 36a-37a.

3. Finally, petitioners claim that, because this case was originally removed from state court, the court of appeals violated principles of "comity" by

declining to reach the merits of their fraud claim and not ordering a remand of that claim to the state courts in which the "fraud" supposedly occurred. See Pet. 19-22. Apart from decisions relating to the abstention doctrine (see Pet. 22), which has no bearing here, petitioners cite no authority to support their proposition that a "remand" to state court is appropriate under these circumstances, and their argument on that point is without merit. In cases removed from state court, district courts have full authority to review prior state-court proceedings and decisions. See generally *Jackson* v. *American Savings Mortgage Corp.*, 924 F.2d 195, 198 (11th Cir. 1991).

In any event, the court of appeals' disposition of this case does not affect any interest of the state system. As the district court determined (Pet. App. 31a-33a, 36a-37a), petitioners had a full and fair opportunity to present their fraud claims to the state courts. Once they raised those claims for the first time on appeal in the state-court proceedings, the Arizona Court of Appeals dismissed them as untimely and affirmed the judgment of the state trial court. See *id.* at 25a. Under those circumstances, a "remand" to the state system—to address issues that the state courts themselves refused to address the first time—would indeed have been a "fruitless gesture." *Id.* at 10a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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